

**THE STATE OF NEW HAMPSHIRE**  
**SUPREME COURT**

**In Case No. 2004-0323, David Riss v. Town of Madison, the court on October 20, 2005, issued the following order:**

The respondent, the Town of Madison (town), appeals an order of the trial court finding that a portion of the property of the petitioner, David Riss, is a private way rather than a public road. We affirm.

RSA 229:1 (1993) sets forth the alternative ways in which a road may become a public highway. We note that the parties differ in their classification of the contested property in this case; for ease of reference we will use the term “road,” as the trial court did in its order. The town contends that a portion of the petitioner’s property became a highway by prescription. Whether a highway is created by prescription is a finding of fact; the trial court’s finding is binding upon us unless unsupported by the evidence or erroneous as a matter of law. Mahoney v. Town of Canterbury, 150 N.H. 148, 150 (2003). To establish a highway by prescription, the party claiming the easement must demonstrate that the general public used the way continuously without interruption for twenty years prior to 1968 under a claim of right without the owner’s permission and that the public use was adverse. *Id.* In this case, the trial court found that the party claiming the easement, the Town, had failed to demonstrate that the contested property was used by the public continuously for twenty years.

The town first argues that the trial court “misapplied the law when it engaged in an analysis of whether the road historically had public status or was a private road.” Having reviewed the court’s comprehensive order, we find no error in its legal analysis. The town argues that there were two avenues by which the court could have found that the road remained private. As the town concedes, one basis for such a finding was that the town failed to demonstrate that there was public use for the prescriptive period, a finding specifically made by the trial court in its narrative order.

Nor are we persuaded that the court failed to give adequate weight to the maps and plans presented by the town. The trial court found that the maps did not indicate the public or private nature of the road and further that several other maps of various dates did not include the disputed portion of the road. Given the evidence before it, we find no error in the trial court’s conclusion.

The town also argues that the trial court erred in placing the burden upon the town to establish that the road was a public way. A thorough reading of the

order, however, indicates that the court set forth the correct analysis and burden and that the evidence supports its finding that the town failed to meet its burden to prove that the general public used the road continuously without interruption for twenty years prior to 1968. See id.; Hoffman v. Hoffman, 143 N.H. 514, 519 (1999) (trial judge in best position to evaluate evidence, measure its persuasiveness and appraise credibility of witnesses).

Based upon the record before us and the foregoing analysis, the town's remaining arguments require no further discussion. In the Matter of Hennessey-Martin & Whitney, 151 N.H. 207, 213 (2004).

Affirmed.

NADEAU, DALIANIS and DUGGAN, JJ., concurred.

**Eileen Fox,  
Clerk**